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No. _____

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In The

Supreme Court of the United States

October Term, 1988

ARCH EMMETT GRAHAM,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

I.

Did the Court of Appeals misconstrue FED. R. EVID. 806 so as to require that any inconsistent statement of a hearsay declarant offered for impeachment be semantically inconsistent in all respects with the earlier statement on a word-for-word basis?

LIST OF PARTIES

Arch Emmett Graham,

Appellant below and Petitioner herein

The United States of America,

Appellee below and Respondent herein

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ARCH EMMETT GRAHAM,

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Arch Emmett Graham, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 14, 1988.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit was ordered published, but has not yet been reported. The text of the opinion appears in the appendix as *United States v. Graham*, No. 88-1159 (5th Cir. October

14, 1988). No opinion was issued on denial of petitioner's motion for rehearing. A copy of that order also appears in the appendix.

JURISDICTION

On October 14, 1988, the Court of Appeals for the Fifth Circuit entered an opinion and judgment affirming petitioner's conviction. Thereafter, petitioner timely filed his petition for panel rehearing on October 28, 1988. The Court of Appeals denied the petition for rehearing on November 10, 1988.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Sec. 1254(1) and SUP. CT. R. 20.1.

RULE INVOLVED

Fed. R. Evid. 806 provides as follows:

> When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under

cross-examination. (As amended Mar. 1, 1987, eff. Oct. 1, 1987)

STATEMENT OF THE CASE

Petitioner was charged with conspiracy to distribute cocaine in violation of 21 U.S.C. Sec. 846 and with two counts of distribution of cocaine, in violation of 21 U.S.C. Sec. 841(a)(1). It was the government's position that petitioner conspired with one Brian Williams to deliver cocaine and aided and abetted Williams in two deliveries of this substance to an undercover officer. Petitioner was ultimately convicted of the conspiracy count and one of the distribution counts. Punishment was assessed at five years' imprisonment on both counts, the sentences to run concurrently.

By all accounts, the prime mover behind this conspiracy was Brian Williams. Williams agreed to sell one pound of cocaine to Javier Pena, an undercover Drug Enforcement Administration agent, for $20,000 or $1,300 per ounce. (R. Vol. V 90; 109-110). Several meetings and conversations between Williams and Pena were conducted to arrange this transaction. Ultimately, on the afternoon of July 8, 1987, Williams delivered a small amount of cocaine to Pena, and later that night, Williams delivered the promised amount of cocaine to Pena in a motel room. (R. Vol. V 117; 212-125).

The government's evidence against petitioner may be summarized as follows. Petitioner was present at an initial meeting where the cocaine transaction was discussed. After petitioner left this meeting, Williams asserted that petitioner was one of his runners and that petitioner

would drive a second pound of cocaine to Pena in San Antonio at a later date. (R. Vol. V 90-91). Petitioner also attended the afternoon meeting between Williams and Pena on July 8, 1987; at this meeting, petitioner allegedly told Pena that he would drive the second pound of cocaine to him because he was very familiar with the San Antonio area. (R. Vol. V 116). Finally, petitioner was present later that evening when the pound of cocaine was delivered. At that time, petitioner purportedly made a statement indicating knowledge of the contraband: when Pena asked if the contraband had come by air, petitioner replied, "no, but it could have." (R. Vol. V 123-124).

By far the most damaging evidence against petitioner was Williams' assertion that petitioner was one of his runners and would perform an act in furtherance of the conspiracy. Shortly before trial, however, Williams denied these assertions in open court. Prior to the scheduled joint trial, Williams pleaded guilty. After listening to the government's summary of evidence, Williams stated to the court that he had not told Agent Pena that petitioner was one of his runners and had not told the agent that petitioner would deliver a second pound of contraband to San Antonio. (R. Vol. III 15). All parties to the case, including Agent Pena, were present at this hearing.

During trial, Agent Pena was allowed to testify concerning Williams' statements implicating petitioner pursuant to FED. R. EVID. 801(d)(2)(E). Upon cross-examination of Pena, petitioner sought to impeach Williams' credibility by questioning Pena concerning Williams' recanting statements at his plea hearing. The trial court refused to permit such questioning, initially ruling that petitioner was not entitled to impeach Williams'

credibility through a third party witness. (R. Vol. V 136). Later, the trial court held that impeachment was not proper under Rule 806 because Williams' statements at his plea hearing were not inconsistent with his earlier assertions to Pena. According to the court, the later statements were not inconsistent because Williams had not denied that petitioner was his associate; he had merely disclaimed telling this to Pena. Thus Williams' later statements were impeaching as to Pena's credibility, not Williams', and were thus inadmissible under Rule 806. (R. Vol. V 199-200).

On appeal, the Fifth Circuit agreed with the second rationale offered by the trial court to exclude evidence of Williams' later statements. The Court of Appeals held that they were not inconsistent with Williams' earlier declarations concerning petitioner's complicity – rather, they went only to the issue of whether Williams actually made any statements, not whether any statements made were true. *United States v. Graham*, No. 88-1159 (5th Cir. October 14, 1988) *Slip op.* at 9. Accordingly, Williams' later statements to the court would implicate only Pena's credibility and were properly excluded under Rule 806. *Slip op.* at 9-10. In a footnote, the Fifth Circuit concluded that petitioner could have called Williams to testify that he had never made the statements at issue to Agent Pena, and why he had not done so was "known only to him and his counsel." *Slip op.* at 10 n. 6.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT, BY ITS MISCONSTRUCTION OF FED. R. EVID. 806, HAS SUBSTANTIALLY VITIATED THE EFFECT OF THAT RULE, AND THIS DECISION RAISES IMPORTANT AND UNRESOLVED PROBLEMS WHICH SHOULD BE REVIEWED BY THIS COURT.

The Fifth Circuit has apparently ruled that impeachment of a hearsay declarant with an inconsistent statement cannot be accomplished under Rule 806 unless the statement offered for impeachment is semantically inconsistent in all respects. This hypertechnical construction conflicts with both the letter and spirit of Rule 806 and indeed substantially vitiates the effect of this rule. Such an unfortunate precedent should be reviewed and corrected by this Honorable Court.

Rule 806 protects important values within our judicial system. It ensures that a party offering hearsay statements is not insulated from having the hearsay declarant's credibility tested before the trier of fact. *See* FED. R. EVID. 806, advisory committee's note.

This is particularly vital in conspiracy cases. As this Court has before recognized, Rule 806 acts as a counterweight to the government's ability to introduce co-conspirator statements under Rule 801(d)(2)(E). If the accused is unsuccessful in excluding hearsay statements of a co-conspirator, Rule 806 still allows him to attack the value of the evidence as it relates to the substantive issue in the case. *Bourjaily v. United States*, ___ U.S. ___, 107 S.Ct. 2775, 2781 (1987).

The importance of Rule 806 in conspiracy cases cannot be overemphasized. In the present case, as in most such cases, the co-conspirator did not personally testify for the government. Thus, a witness of perhaps doubtful credibility was never seen by the trier of fact. Instead, the co-conspirator's statements were relayed through a much more credible witness – a government law enforcment officer. Fairness dictates that any contrary statements made by the co-conspirator be placed before the trier of fact so that this absent witness' credibility may be fairly judged. This is exactly what Rule 806 permits.

The beneficial aspects of this rule, however, are destroyed by the hypertechnical and disingenuous construction adopted by the Fifth Circuit in this case. According to the opinion of the court, an inconsistent statement offered under Rule 806 cannot be admitted unless it is completely and linguistically inconsistent with the declarant's earlier statement. Such a construction is not supported by either the language of Rule 806 or the facts of this case.

Agent Pena's testimony in this case concerning Williams' hearsay statements implicating petitioner can be broken down into two conceptual parts: first, that the statements were made and second, that they were offered for the truth of the matter asserted. Indeed, Williams' statements would not be evidence of petitioner's guilt unless so offered.

When Williams testified before the court at his plea hearing, his statements could also be separated into two conceptual parts: first, that the statements were not made, and the reasonable and logical inference is that

they were not made because they were not true. Thus, Williams' statements at the plea hearing were completely inconsistent in content with the earlier declarations made to Pena.

On a more basic level, the issue of what, if anything, Williams had said directly implicated his credibility. Pena's resume of Williams' declarations before the jury was the equivalent of Williams' assertion that those statements had been made. Before the court, however, Williams made a directly contrary assertion. Thus, both parties to the case held different positions on the fact of whether Williams made any statements concerning petitioner's guilt. (To illustrate, suppose petitioner had been successful in calling Williams to testify that he had never made the statements at issue to Pena. It is submitted that both parties would have focused on Williams' credibility – on whether he made the statements – rather than on Pena's powers of recall).

In truth, the credibility of both Williams and Pena was implicated by Williams' inconsistent later statements. To the extent that the later statements were inadmissible to impeach Pena, a proper limiting instruction could have been submitted.

The opinion of the Fifth Circuit is wrong on all counts. It is not supported by the language of Rule 806, and simply fails to appreciate how people communicate. At his plea hearing, Williams clearly sought to exculpate petitioner – what motive did he have at that point to attack Pena's credibility? Williams certainly understood his later statements to be inconsistent, and it is submitted that a jury would have found likewise.

Moreover, the hypertechnical approach taken by the Fifth Circuit substantially frustrates the values protected by Rule 806. Many otherwise inconsistent statements will fail to survive the Court's word-for-word inconsistency requirement. Given the dearth of authority construing Rule 806, this opinion stands as a most unfortunate precedent for future cases.

It should be a matter of some concern that the construction adopted by the trial court and the Court of Appeals deprived petitioner of a fair trial. The government was permitted to present before the jury Williams' statements implicating petitioner. As far as the jury knew, Williams had never said anything to the contrary, much less any statements which were virtually exculpatory as to petitioner. In other words, the government was allowed to present the statements of a co-conspirator while having the crucial issue of this witness' credibility effectively shielded from the jury.

This raises some disturbing implications. Rule 801 (d)(2)(E), as interpreted by this Court and other federal courts, allows liberal admission of a co-conspirator's statements. Rule 806 is often cited as a balancing factor which allows an accused to test the substantive value and credibility of such statements. The construction fashioned by the Fifth Circuit leaves Rule 806 without any real utility in this regard. If Rule 806 is thus valueless, then the constitutionality of Rule 801 (d)(2)(E) must also be suspect as denying constitutional guarantees of confrontation and cross-examination.

In any event, the Fifth Circuit opinion neither fairly nor accurately construes Rule 806. The Court of Appeals'

substantially misconceived opinion is an unfortunate, though important, precedent and should be reviewed and corrected by this Honorable Court.

II.

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH A DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS ON THE PROPER CONSTRUCTION OF RULE 806.

The Court of Appeals' opinion in this case conflicts in principle with a decision of the Seventh Circuit Court of Appeals on a substantially similar issue. That opinion, *United States v. Pizarro*, 717 F. 2d 336 (7th Cir. 1983), demonstrates the proper application of Rule 806.

Due to a reversal and a mistrial, Pizarro was tried three times for various drug offenses related to the sale of heroin. The government presented evidence of taped telephone conversations between a government agent and Rodriguez, a co-defendant, at both the second and third trials. These statements, along with other government evidence, identified Pizarro as the source of the heroin.

During the second trial, Rodriguez testified that another person, not Pizarro, was the source of the contraband. The evidence would have supported either inference. At the third trial, however, Rodriguez declined to testify. *United States v. Pizarro*, 717 F. 2d 341-342; 349-350.

Thus, at the third trial, Pizarro sought to introduce Rodriguez's statements made at the second trial. The district court excluded these statements. 717 F. 2d 349-350.

This case was primarily analyzed under FED. R. EVID. 804, as Rodriguez's statements were made as former testimony. The Seventh Circuit also held that these statements would have been admissible as impeachment under Rule 806:

> And given the government's ability to present Rodriguez's hearsay statements against Pizarro through its tape recordings both at the second as well as the third trial, Pizarro was surely entitled to present Rodriguez's subsequent exculpatory trial testimony to the jury for its evaluation. Both sides were then free at the third trial to present whatever corroborative or impeachment evidence they possessed to shore up their respective positions on Rodriguez's veracity at the second trial, including any evidence of death threats which the trial court determined were admissible. *See* Fed. R. Evid. 806.

717 F. 2d 350.

Of course, Rodriguez's exculpatory testimony would not have survived the Fifth Circuit's "word-for-word" test because it was not technically inconsistent with his recorded hearsay statements introduced by the government.

These earlier statements did not directly identify Pizarro as the source of the heroin; such an inference could only be drawn in concert with other evidence introduced by the government. The Seventh Circuit, however, quite properly recognized that Rodriguez's testimony at the second trial was inconsistent in content with his earlier hearsay statements which circumstantially implicated Pizarro.

Pizarro represents a construction of Rule 806 which embodies values of fairness which that rule encompasses.

Unfortunately, although petitioner cited this case in his appellate brief (as he did before the trial court on motion for new trial), the Fifth Circuit did not see fit to address or discuss the merits of this authority. Petitioner submits that this Court should grant the writ as requested and resolve this important conflict in principle so as to eliminate the misconstruction of Rule 806 now adopted as precedent by the Fifth Circuit.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 9, 1989

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1159
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ARCH EMMETT GRAHAM,

Defendent-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(October 14, 1988)

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Defendant Arch Emmett Graham ("Graham") was convicted of one count of distributing cocaine in violation of 21 U.S.C. § 841(a)(1) and one count of conspiracy to distribute cocaine, 21 U.S.C § 846, and sentenced to five years imprisonment on each count, the sentences to run concurrently. Graham now appeals on several grounds. Finding no error in his trial and that the evidence is sufficient to sustain conviction on both counts, we affirm.

I.

On July 2, 1987, Javier Pena ("Pena"), a special agent with the Drug Enforcement Administration, and Sharon Ross ("Ross"), a police officer, working undercover, met

with Brian Williams ("Williams") to arrange the purchase of cocaine. The meeting took place at Jim's Restaurant ("Jim's") in Austin, Texas; Pena, Ross, Williams, and Graham were all present.

At this first meeting, Pena and Williams discussed the purchase of cocaine by Pena from Williams. According to government witnesses, Graham did not participate in the conversation, but was listening intently. After five to nine minutes, Graham got up and left the restaurant. After Graham left, according to Pena, Williams told Pena that Graham was one of Williams's runners.[1] Later, when Pena indicated that he would want to make a second purchase of cocaine after the first transaction was completed, Williams stated that Graham would drive the second shipment of cocaine to San Antonio for Williams. Plans for the second purchase were made for Friday, July 10.

Preparations for the first purchase continued. After several aborted attempts at completing the transaction, Pena called Willams on July 8 at 2:00 p.m. Williams told Pena that everything was ready to go, but that Pena should call back later to take care of the final details. When Pena called again, Williams told him that he had sent one of his men on a flight to pick up the cocaine and that the man would arrive in Austin about 9:00 that evening. Willaims and Pena also made arrangements to meet again at Jim's so that Pena could receive a sample of the cocaine.

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[1] A runner is a person who transports illegal substances for another.

At that meeting, which took place at 4:15 that same day, Williams stated that he had sent one of his runners by plane to Houston to pick up the cocaine and that it would be in by 9:00 or 9:30. In reference to the second transaction, Williams also asserted that "they" would be able to deliver the second pound of cocaine to Pena in San Antonio on Friday.

Shortly after this conversation, Graham arrived at Jim's in the company of an unidentified woman and sat down with Williams and Pena, who continues to discuss the two drug transactions. During a break in the conversation in which Williams left to make a phone call, Graham told Pena that Graham would drive the second pound of cocaine to San Antonio for Pena, because Graham was very familiar with the San Antonio area.

After Williams returned, Williams and Pena then discussed the first purchase of cocaine to take place that evening, with Pena agreeing to rent a room at a nearby motel to secure a location for completing the transaction. Graham, who Pena testified was listening but not participating in the conversation, acknowledged the meeting at the motel by nodding his head.

At the end of the meeting, Williams gave Pena a sample of cocaine hidden in a package of cigarettes. Again, according to Pena, Graham was present and listening to Williams when Williams told Pena that the package contained cocaine.

At 9:00 p.m., Pena called Williams and told him that he had secured a room at a different motel. Williams acknowledged the change and told Pena that "they" would be at the motel to deliver the cocaine at 10:00 p.m.

Williams and Graham arrived at the room at 10:05 p.m. As Williams entered, he handed Pena a brown paper bag which he had been carrying. As Williams and Graham sat on the bed, Pena removed a bundle from the bag, removed a small amount of white powder later identified to be cocaine, and weighed the remainder of the package. Williams assured Pena that the cocaine was "real good quality, you won't be disappointed." While the package was still on the scales, Pena asked Williams if the substance had come in by airplane, to which Graham replied "No," and, after hesitating, added "but it could have."

Shortly thereafter, while still in the motel room, Williams and Graham were arrested and immediately read their *Miranda* rights. Graham then turned to Pena, and, using Pena's undercover name, said, "Juan, you're my witness, you saw me, I never touched the dope." After repeating this exclamation several times, Williams told Graham to be quiet and that Williams was going to call an attorney.

II.

Williams and Graham were indicted as co-defendants on one count of conspiracy to distribute cocaine and two counts of distribution of cocaine. On November 17, 1987, the case was called for trial, at which point Williams pleaded guilty to the indictment. After listening to the government's summary of the evidence, Williams told the court that he had never told Pena that Graham was one of his runners of that Graham would drive the second purchase of cocaine to San Antonio.

The case went to trial on the issue of Graham's guilt. Pena testified as to Graham's involvement in the transactions, and specifically noted Williams's statements that Graham was one of his runners and that Graham would drive the second purchase of cocaine to San Antonio. On cross-examination, Graham's attorney attempted to ask Pena about Williams's denials made the day before, but the trial court sustained the government's objection to the questions and to the introduction into evidence of Williams's statements through Pena.

The jury returned a verdict of guilty on one count of distribution and the conspiracy count, and judgment was entered accordingly. Graham now appeals, alleging (1) that the trial court erred in refusing to allow Graham to impeach Williams's testimony by asking Pena about Williams's inconsistent statements, (2) that the evidence is insufficient to sustain Graham's conviction for either count, and (3) that the trial court instruction to the jury on the issue of intent impermissibly created a mandatory presumption of intent.

III.

Graham's first contention on appeal is that the trial court erred in refusing to allow him to cross-examine Pena on the statements made by Williams while pleading guilty. Because Pena testified as to Williams's statements concerning Graham made during their meetings at Jim's, Graham argues that Williams's subsequent denials of having made the statements are admissible under rule 806 of the Federal Rules of Evidence, which permits the credibility of a hearsay declarant to be impeached with

any evidence which would be admissible if the declarant had in fact testified as a witness.[2]

While pleading guilty before the same judge who conducted Graham's trial, Williams engaged in the following dialogue with the court after the prosecution had summarized the government's evidence against him:

> THE COURT: Mr. Williams, do you have any disagreement with the prosecutor's summary of what you did?
>
> DEFENDANT WILLIAMS: Yes, sir. One, I didn't state [Graham] was one of my runners to Pena and – let's see – the delivery to SA, I don't – Arch Graham couldn't never done anything without my word, without my say-so. And it would make no sense for him to be able to say anything like that.
>
> THE COURT: I'm not following that part of it, Mr. Williams.
>
> DEFENDANT WILLIAMS: Okay. It was said that Arch Graham said to [Pena] that he would deliver the second pound, or I told him that I would have Arch deliver the second pound of cocaine. that's a false statement; I didn't say that at all. As a matter of fact, I denied San Antonio altogether.

Pena was present in court when Williams denied having made the statements. At Graham's trial the next day,

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[2] Rule 806, in pertinent part, reads as follows:

> When a hearsay statement, or a statement defined in Rule 801(d)(2),(C),(D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

Pena testified that during their first meeting, Williams first told him that Graham was one of his runners and later said that he would have Graham drive a pound of cocaine to San Antonio to complete the second transaction.[3] When Graham's counsel tried to cross-examine Pena with Williams's denials of the day before, the government objected, and the trial court sustained its objection.[4]

A trial court's evidentiary ruling will be reversed only if it constitutes an abuse of discretion. *See United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988). A careful analysis of rule 806 and Williams's two sets of statements reveals that, far from constituting an abuse its discretion, the trial court's ruling is undoubtedly correct.

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[3] Williams's statements as to Graham's involvement in the transactions were admitted under rule 801(d)(2)(E), which allows statements of a co-conspirator to be admitted as substantive evidence against a defendant.

[4] After reflection, the trial court gave the following reason for its ruling:

> Rule 806 would allow evidence of a subsequent inconsistent statement that Mr. Williams might have made, and if Mr. Pena were in a position to testify as to such statement, I think it would be admissible, but that is to impeach Mr. Williams, the declarant, according to the rule. What he said was that – or Mr. Pena said that, 'Mr. Williams told me that, "Mr. Graham was one of my runners." ' Mr. Williams in his statement yesterday did not make an inconsistent statement as to that; he said, 'I didn't tell Mr. Pena that Graham was a runner,' And that statement could only be used to impeach Mr. Pena, and is improper impeachment of Mr. Pena, I think. If Mr. Williams had said yesterday, 'Mr. Graham was not my runner,' that's one thing, but that's not what he said.

The purpose of rule 806 is to establish a standard for attacking the credibility of a hearsay declarant: "The credibility of the *declarant* may be attacked . . . by any evidence which would be admissible for those purposes if declarant had testified as a witness." Fed. R. Evid. 806 (emphasis added). The Advisory Committee Notes accompanying the rule explain the underlying rationale for the rule by noting that "[t]he declarant of a hearsay statement which admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified." Fed. R. Evid. 806 advisory committee note. Under rule 806, therefore, any prior of subsequent inconsistent statements by *Williams,* the *declarant,* would be admissible to impeach *Williams's* credibility, just as if Williams himself had testified.

Rule 806, however, requires that a court first decide whether the proffered statement is actually inconsistent with the hearsay statement already admitted. *See United States v. Hale,* 422 US. 171, 176 (1975). In this case, Williams's later statements simply are not inconsistent with "his" hearsay testimony presented through Pena, and thus were properly excluded.

The essence of Williams's hearsay delcarations were "Graham was my runner" and "Graham will drive the second shipment of cocaine to San Antonio"; his later statements to the court that "I didn't state [Graham] was one of my runners to Pena" and "I didn't say [that Graham would drive the cocaine to San Antonio] at all" are in no way inconsistent with his earlier declarations. Williams's subsequent statements do not lead one to question whether his earlier statements were untrue, or

whether Williams's testimony in the form of his hearsay declarations was unreliable; rather, they go only to the issue of whether Williams actually made any statements, not whether any statements made were true.[5]

As such, the statements would implicate only Pena's credibility, as it was Pena who testified that Williams made the statements at issue. Thus, rule 806, which establishes standards only for the impeachment of Williams, does not authorize introduction of Williams's subsequent hearsay statements impeaching Pena; and no other hearsay exception being applicable, the statements were properly excluded.[6]

The trial court's ruling was properly based upon what Williams actually said while pleading guilty, not

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[5] Indeed, the hallmark of an inconsistent statement offered to impeach a witness's testimony is that the statement is not hearsay within the meaning of the term, i.e., it is not offered for the truth of the matter asserted, *see* Fed. R. Evid. 801(c); rather, it is offered only to establish that the witness has said both "x" and "not x" and is therefore unreliable. In this case, the only way Williams's subsequent statement, "I did not tell Pena that Graham was my runner" could affect the jury's deliberations would be if they accepted the statement as true, and thus refused to believe Pena's testimony. It is thus hearsay in every sense of the term, and was offered to attack not Williams's credibility but Pena's.

[6] This does not mean that Graham could not impeach Pena's testimony, but only that he could not do so by using Williams's subsequent hearsay statements. Nothing prevented Graham from calling Williams to testify that he never made the statements at issue to Pena; why Graham did not do so is known to him and his counsel.

upon what Graham thinks Williams meant to say or what Graham wishes he had said. Because Williams's later statements were not inconsistent with his first statements to Pena, the trial court was correct in refusing to admit them under rule 806.

IV.

Graham's next contention is that the evidence adduced at trial is insufficient to support his conviction on either count. Reviewing the evidence in the light most favorable to the government, *see United States v. Fortna*, 796 F.2d 724, 740 (5th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 437 (1986), we conclude that a reasonable trier of fact could find that the evidence establishes Graham's guilt on both counts beyond a reasonable doubt.

A. The Distribution Count.

Because Graham did not personally deliver the cocaine to Pena, the government's theory is that Graham aided and abetted the delicery of cocaine. To sustain a charge of adiing and abetting, the government must demonstrate that Graham " 'wilfully associate himself in some way with the criminal venture and wilfully participated in it as he would in something he wished to bring about.' " *United States v. Natel*, 812 F.2d 937, 941 (5th Cir. 1987) (quoting *United States v. Tolliver*, 780 F.2d 1177, 1184 (5th Cir. 1986), *vacated on other grounds*, ___ U.S. ___, 107 S. Ct. 1267 (1987)).

There is ample evidence from which a reasonable jury could conclude that Graham aided and abetted Williams's distribution of cocaine. Graham was present at

both meetings between Williams and Pena, and, government witnesses testified, was listening intently to their negotiations for the purchase of cocaine. Williams identified Graham as one of his runners and stated that Graham would assist in the second transaction by driving the cocaine to San Antonio; Graham himself later told Pena that Graham would do so. Graham also physically acknowledged the meeting at the motel room to complete the first transaction, and accompanied Williams there at the time when Williams said "they" would deliver the cocaine.[7]

At the motel, Graham watched while Pena extracted a sample of the cocaine from the bundle and weighed the remainder. Graham heard Pena and Williams discuss the quality of the cocaine, and Graham answered Pena's question as to the origins of the cocaine. Finally, after being arrested, Graham evidenced his knowledge of the

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[7] Graham testified that he attended the first meeting for the sole purpose of purchasing some marijuan from Williams, and that he did not hear Williams and Pena discuss the sale of cocaine because he was at the other end of a large booth. As for his attendance at the second meeting, Graham testified that Williams invited him and his girlfriend to join him for a free meal, and that he did not hear Williams and Pena discuss the sale of cocaine. Graham also denied saying that he would drive the second shipment of cocaine to San Antonio for Pena. In light of the government's substantial evidence to the contrary, we will respect the jury's decision not to credit Graham's testimony.

contents of the package by his exclamation to Pena that he "never touched the dope."[8]

Contrary to Graham's contention that the evidence merely establishes that he was an "informed spectator," the evidence is sufficient for a reasonable factfinder to conclude that Graham, by virtue of his knowledge of every facet of the transaction and his presence at every meeting related thereto, knowingly and intentionally aided and abetted Williams's distribution of cocaine. Hence, we affirm the verdict on the distribution count.

B. The Conspiracy Count.

To sustain the conspiracy conviction, the government must establish beyond a reasonable doubt that a conspriacy to violate the law existed, that Graham knew of the conspiracy, and that he intentionally joined and participated in it. *See United States v. Prieto-Tejas*, 779 F.2d 1098, 1102 (5th Cir. 1986). The jury may infer a conspiracy agreement from circumstantial evidence, *see United States v. Mollier*, 853 F.2d 1169, 1172 (5th Cir. 1988), and may rely upon presence and association, along with other evidence, in finding that a consiracy existed. *See United States v. Magee*, 821 F.2d 234, 239 (5th Cir. 1987).

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[8] According to Graham's testimony, his incredible streak of being in the wrong place at the wrong time continued when he accompanied Williams to Pena's motel thinking that Williams was in the process of procuring a loan for him. Graham stated that he was unaware that Williams was carrying cocaine until he saw Pena remove a small sample from the package. Again, we find no reason to question the jury's decision as to the credibility of Graham's testimony.

The evidence summarized above, voewed in the light most favorable to the government, is sufficient to establish that Graham was not just present "in a climate of activity that reeks of something foul," *United States v. Weischenberg*, 604 F.2d 326, 332 (5th Cir. 1979); rather, a reasonable jury would have ample reason to find that Graham was an active participant in a conspiracy with Williams to engage in the sale of cocaine to Pena.

V.

Graham's final argument is that the trial court erred in giving the following instruction on the issue of Graham's intent:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequence of his or her knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that a defendant possessed the required criminal intent.

Graham argues that a reasonable juror could have understood the trial court's instruction as creating a mandatory presumption of intent: Once the government proved the underlying acts giving rise to the inference, intent would be presumed unless Graham proved otherwise. Such an instruction, Graham argues, was declared unconstitutional in *Francis v. Franklin*, 471 U.S. 307 (1985), because it shifts to the defendant the burden of persuasion on the

element of intent, in violation of the defendant's right to due process.

In *Franklin*, the Supreme Court characterized the instruction before the Court as

> cast in the language of a command. [It] instruct[s] the jury that 'acts of a person of sound mind and discretion *are presumed* to be the product of the person's will' and that a person *'is presumed* to intend the natural and probable consequences of his acts' . . . The jurors 'were not told that they had a choice, or that they *might* infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory.'

Id. at 316 (quoting *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979)) (emphasis added by *Franklin* Court). In contrast, the Court noted that "a *permissive* inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Id.* at 314 (emphasis added).

The instruction given in Graham's trial is clearly phrased in permissive terms. Graham contends, however, that because the trial court did not instruct the jury as to the definition of a permissive inference or how it is to be applied to the facts of the case, it was reasonable for the jury to conclude that the trial court's instruction nonetheless created a mandatory presumption of intent.

Graham's argument is without merit. The instruction itself is a definition of a permissive inference in the context of intent, and the instruction makes it unmistakably clear that any inference drawn is only to be *considered*

in deciding whether the government has proved intent beyond a reasonable doubt.

Moreover, we have considered and approved an instruction remarkably similar to that given in Graham's trial. *See United States v. Kimmel*, 777 F.2d 290 (5th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986).[9] We considered *Franklin* and held that although "the Supreme Court and we have struggled often with inferred intent instructions, that given here is clearly acceptable and we are duty bound to follow the law approving its use." 777 F.2d at 292. The same result obtains here.

The judgment of the trial court is AFFIRMED.

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[9] The instruction considered by the *Kimmel* Court read:

> As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of [sic] conscious omission and any such inference is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent.

777 F.2d at 292.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 88-1159
Summary Calendar

D.C. Docket No. A-87-CR-58-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARCH GRAHAM,

Defendant-Appellant.

(filed October 14, 1988)

Appeal from the United States
District Court for the
Western District of Texas

Before POLITZ, KING, and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

October 14, 1988

ISSUED AS MANDATE: Nov 21 1988

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ Carol G. LeSage
Deputy
New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARCH GRAHAM,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING
(November 10, 1988)

Before POLITZ, KING and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge
